

# JUST WAR THEORY APPLIED TO US POLICY IN PAKISTAN AND YEMEN

A Monograph

by

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## ABSTRACT

JUST WAR THEORY APPLIED TO US POLICY IN PAKISTAN AND YEMEN, by Major Eric K. Hendrickson, United States Air Force, 53 pages.

Since 9/11, the United States has been involved in numerous conflicts, both declared and undeclared. As these conflicts have lingered, especially those in Pakistan and Yemen, there has been an increase in dialog concerning the legality and justness of the conflicts as well as the methods used therein. The lack of neutral journalism in the remote areas of Pakistan and Yemen has only added to the speculation, as reports emerge of airstrikes killing non-combatants. Many fear unforeseen ethical, military, and political implications that may emerge from the use of covert RPA strikes. This monograph postulates that the question of legality is easily answered by referring to United Nations Security Council Resolution 1368, but the question of justness is much more elusive. Just War Theory, representing two thousand years of precedence, offers a unique and holistic approach that can dissect US policy in Pakistan and Yemen, providing insight into each conflict. By looking at the justness of the cause of war (*Jus ad Bellum*), conduct in war (*Jus in Bello*), and end of war process (*Jus post Bellum*), Just War Theory provides a comprehensive approach that, if used as a heuristic, can provide governments a just path to follow. In the cases of Pakistan and Yemen, the monograph concludes the United States has a just cause, appears to be fighting justly, but falls short of just war in the end.

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## ACRONYMS

CIA	Central Intelligence Agency
DPH	Direct Participation in Hostilities
FATA	Federally Administered Tribal Areas
GWOT	Global War on Terror
ICRC	International Committee of the Red Cross
IHL	International Humanitarian Law
LWJ	Long War Journal
NAF	New America Foundation
OEF	Operation Enduring Freedom
RPA	Remotely Piloted Aircraft
TBIJ	The Bureau of Investigative Journalism
UAV	Unmanned Aerial Vehicle

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## INTRODUCTION

In an age of interconnectivity and law, Just War Theory may seem irrelevant. Not only are laws concerning warfare existent within United States code, but they exist internationally as well. Legally, except for obvious wars of self-defense or other-defense against a clear antagonist, a United Nations Security Council vote is required under article 51. The United Nations (UN) provides clear requirements on whether or not one can go to war, but nothing under article 51 states whether or not one should go to war.<sup>1</sup> It is always easy to judge wars with hindsight. It is much more difficult to judge a war with foresight, but that is exactly what a state leader must do before committing to an action he or she cannot take back.

When President Bush learned of the attacks on 11 September 2001, especially with the attack on the Pentagon, (a clear military target), it became easy to commit the United States to war. According to the United Nations, every state has that right. Just War Theory helps a leader make that decision with a cooler head, ensuring revenge is not the driving factor.<sup>2</sup> In short, rather than concerning itself with whether a state can go to war, Just War Theory is more concerned with how and why a state initiates, fights, and concludes war. Only when considering the motives and means does it prescribe whether a state should or should not go to war. After all, “*warfare is precisely, and ultimately, about governance...* War is the ultimate means for deciding these issues if a peaceful process or resolution can’t be found.”<sup>3</sup> This, of course, means that a peaceful resolution is desirable and must be sought. Only after such a solution proves elusive should a state commit to war. When it does, the state should be mindful to not fall into the role of aggressor.

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<sup>1</sup>“Charter of the United Nations,” United Nations, <http://www.un.org/en/documents/charter/chapter7.shtml> (accessed September 26, 2013).

<sup>2</sup>Brian Orend, *The Morality of War* (Toronto: Broadview Press, 2006), 1.

<sup>3</sup>Ibid., 3.

The concept of a just war ties right back into the United Nations. Getting UN approval before initiating hostilities is not a requirement, but is critical concerning the topic of legitimacy.<sup>4</sup> The UN Security Council's (UNSC) primary responsibility is to maintain international peace and order.<sup>5</sup> In what seems to be an anarchical world, unitary action can be taken legally, but as a conflict drags on, support quickly drops off domestically, and condemnation grows both internally and externally. Following the established order by garnering a resolution from the Security Council achieves legitimacy by demonstrating that a state is behaving as a responsible member of the international community. The UN Security Council consists of five permanent members (the United States, Britain, China, France, and Russia) and 15 non-permanent members who hold rotating two year terms. Any member may introduce and vote on resolutions, but only the five permanent members may veto a resolution. To pass, a resolution requires a majority of votes without any vetoes. Unfortunately, the opposing spectrum of politics from the five permanent members often takes center stage, preventing effective cooperation toward the singular purpose of the UNSC. The result is often gridlock. War is a state of emergency, and to a nation looking for a resolution, time often is in short supply.

Not only is the process often halted, but international law often falls short of the desired outcome. For a number of parties to agree on an issue to produce a law, the only way to quell grumbling is for the resultant product to be vague and stripped of meaning. While it does allow different states to come together on a topic while exercising their separate ideologies, the lack of clear definitions creates significant uncertainty. To add to the uncertainty of law, it often "lags

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<sup>4</sup>Ian Hurd, "After Anarchy: Legitimacy and Power in United Nations Security Council," ForeignAffairs.com, <http://www.foreignaffairs.com/articles/62860/g-john-ikenberry/after-anarchy-legitimacy-and-power-in-united-nations-security-co> (accessed January 29, 2014).

<sup>5</sup>UN.org, "United Nations Security Council," <http://www.un.org/en/sc/> (accessed January 18, 2014).

behind the times.”<sup>6</sup> In other words, when a law is written, the law considers historic precedence, without which, the law would be very difficult to formulate. Military and political leaders, however, tends to be forward thinking. Rather than perpetuate old ideas, it looks for the next advantage. In the case of the Global War on Terror, the use of armed Remotely Piloted Aircraft (RPA) is an example of such forward looking.

If the UNSC is unable to act, whether by deadlock or circumstance, a state facing a crisis needs another plan of action. A UNSC resolution provides legitimacy, but it is not the only means of earning it. When facing such a dilemma, nothing is more appropriate than Just War Theory. Just War Theory has proven so influential that it has shaped much of the international law concerning warfare existent today, including The Hague and Geneva Conventions.<sup>7</sup> Just War Theory serves as a heuristic. When applied before a conflict begins, it explores the realm of what the war will be, highlights potential problems, provides a framework for internal justification, and ensures all phases of the conflict are considered. If followed faithfully by a state before it makes a commitment to war, Just War Theory will inform the proper authority of said state to the legitimacy of the desired course of action. This legitimacy does not replace the UN, but is rather a model run internally by the state, which provides an alternate to potential stalemate or defeat. Even with a UN Security resolution, Just War Theory provides valuable insight to governmental decision makers and they should explore it fully prior to hostilities. US conflicts in Pakistan and Yemen demonstrate the utility of Just War Theory. Although there is wide dialog on whether the United States should be involved in covert wars, Just War Theory demonstrates that the intentions and actions behind the two conflicts are just, but their covert nature and lack of conceptual end-states makes them unjust.

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<sup>6</sup>Orend, 37.

<sup>7</sup>Robert Kolb, “Origin of the Twin Terms Jus Ad Bellum/Jus in Bello,” ICRC, <http://www.icrc.org/eng/resources/documents/article/other/57jnuu.htm> (accessed September 26, 2013).

## JUST WAR THEORY

Just War Theory is a system of ethical thought developed over two millennia. Originally, of Greco-Roman origins, it can trace its roots back to Aristotle who first used the term “just war” to describe acceptable causes of warfare, such as self-defense.<sup>8</sup> Following Aristotle, Cicero further developed the idea of just war. A lawyer in the Roman Empire, he believed that more was required for a war to be just than an acceptable cause. A proper authority must make the decision to go to war, and a public declaration was required. He also began to cultivate the idea of last resort, a requirement to give the political processes a chance to work. Finally, he argued that surrendering soldiers must be protected rather than killed, giving birth to rules of conduct.<sup>9</sup>

Saint Augustine, who lived from 354 to 430 and served as the bishop of Hippo in modern day Algeria, was an influential proponent who further developed the theory, giving it solid footing in the Catholic tradition of the Roman Empire. His mentor, Ambrose, introduced him to the subject and stressed that combatants should display the classical virtues while fighting. Augustine further developed this idea, and developed the rule of right intent. A just cause is not enough to drive a nation to war. The intent has to be right as well. One does not go to war to get revenge, seize resources, or for other lesser means, but only to right a wrong or protect innocent subjects from harm. Many have labeled Just War Theory a Christian concept because of Augustine’s influence on the subject, but as shown earlier, it has Greco-Roman roots. Christian thinkers influenced it, but it is robust and usable by secular governments. Although Aristotle, Cicero, and Augustine were the first to develop the theory, Thomas Aquinas, John Locke, and other thinkers have added to and refined the theory over the past 2000 years, continuously molding it to match the current political situation.

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<sup>8</sup>Orend, 11.

<sup>9</sup>Ibid.

Modern Just War Theory is broken down into three parts: *Jus ad Bellum*, *Jus in Bello*, and *Jus post Bellum*.<sup>10</sup> These Latin phrases for the justice of war, justice in war, and justice after war respectively, can be studied separately, but each relies on that which preceded it. A war fought justly, but entered into unjustly, is still an unjust war. If fought without regard for civilians, regardless of the start or end, the war is unjust. Finally, as displayed by the June 1919 Treaty of Versailles, a war must conclude justly to prevent repercussions.<sup>11</sup> In other words, a war entered into justly and fought justly, but concluded unjustly, strips justice from the endeavor as a whole. To maintain the moral high ground, one must adhere to all three categories. Doing so imparts legitimacy on the actor: the international community can see that the state involved is acting justly, in a just cause, to bring about a just conclusion. Acting with legitimacy increases credibility internationally and grows soft power,<sup>12</sup> which greatly affects a state's ability to pursue its agenda in the international arena, and thereby the war effort. Each of the three components consists of subcategories that an actor must meet to satisfy the whole.

### *Jus ad Bellum*

According to Brian Orend, the central core of just war theory common to all theorists is that “*sometimes, it is at least morally permissible for a political community to go to war.*”<sup>13</sup> Therefore, all states retain the ability to decide whether to go to war; the difficulty lies in

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<sup>10</sup>David Fisher, *Morality and War: Can War Be Just in the Twenty-First* (Oxford: Oxford University Press, 2012), 66-67.

<sup>11</sup>T.S. Tsonchev, review of *Paris 1919*, by Margaret Macmillan, *The Montreal Review* (Dec 2010): page nr., <http://www.themontrealreview.com/2009/Versailles-Treaty-Peace-without-Justice.php> (accessed November 11, 2013).

<sup>12</sup>Joseph Nye, Jr., *The Future of Power* (New York: PublicAffairs, 2011), 16. Soft power is “the ability to get preferred outcomes through the co-operative means of agenda setting, persuasion, and attraction.” The carrot in the proverbial carrot and stick represents soft.

<sup>13</sup>Orend, 31.

determining if it is just. A state can enter into a conflict justly only if it can meet the requirements of *Jus ad Bellum*, which consists of six rules: just cause, proper authority, right intention, probability of success, proportionality, and last resort.<sup>14</sup>

### Just Cause

Like individuals, all states have inherent rights. According to Article 51 of the UN Charter, every member nation has the right to self-defense and other-defense from aggression.<sup>15</sup> To be more specific, any state recognized by the United Nations as such has the right to defend itself or another recognized state if a victim of an armed attack. These are the most commonplace forms of just cause and the only allowable reasons to go to war under international law without specific authorization and endorsement by the United Nations Security Council (UNSC). However, under just war theory, a state does not require UN approval. Just cause is sufficient if the justice of going to war is great enough to warrant warfare without negating “countervailing values of equal or greater weight.”<sup>16</sup> In other words, a nation must be seeking to right a wrong, without excessive punitive action or revenge that would make a cause unjust.

At times, distinguishing justice from revenge can be difficult, but Michael Price, of the American Psychology Association, describes the difference clearly:

Although revenge resembles some conceptions of justice, vengeance is usually depicted as more injurious and punitive as opposed to being harmonious and restorative. Whereas justice implies actions undertaken and supported by a legitimate judicial system grounded upon a foundation of ethics and morals of the authorities, revenge implies actions undertaken by an individual or narrowly defined group outside the boundaries of judicial or ethical conduct whose goal is to force a wrongdoer to suffer the same or greater pain than that which was originally inflicted to a party.<sup>17</sup>

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<sup>14</sup>Ibid., 61.

<sup>15</sup>United Nations, “Charter of the United Nations.”

<sup>16</sup>Mark Evans, *Just War Theory: A Reappraisal* (New York: Palgrave Macmillan, 2005), 12.

<sup>17</sup>Michael Price, “Revenge and the People Who Seek It,” *Monitor on Psychology* 40, no. 6 (June 2009), <http://www.apa.org/monitor/2009/06/revenge.aspx> (accessed October 6, 2013).

Although much of what takes place in a war that has a just cause and a war of revenge will be similar, there undoubtedly will be a large list of differences as well. If the motive is revenge, what happens to surrendering enemy personnel when it is inconvenient to take them prisoner? Do they become prisoners of war with associated rights under the Geneva Conventions, are they mistreated while being captured, or are they added to the list of enemy killed in action? Distinguishing that a conflict is just is imperative before entering into one.

### Proper Authority

Once just cause is settled, the issue of proper authority arises. Already established is the role of the United Nations, but in this case proper authority refers to the internal structure of the state itself. Legally, a constitutionally authorized member or body of a recognized UN state must be the one to decide upon a war.<sup>18</sup> This legal definition leaves a bit wanting however. The definition does not delve into whether or not the regime in control is legitimate. In the preamble to the Universal Declaration of Human Rights, legitimate state governments are governments that have “pledged themselves to achieve, in co-operation with the United Nations, the promotion of universal respect for and observance of human rights and fundamental freedoms.”<sup>19</sup> Of particular note, no state is required to provide a minimum required level of human rights, but rather promote the respect for and observance of human rights and fundamental freedom. Again, intent matters more than effects. A nation does not gain legitimacy by having power to effect change, but rather by desiring positive change that respects the individual human rights and freedoms of its citizens. Only a government that strives to provide at least a minimum level of justice to its citizens can declare war legitimately, and then only the member or body rightfully designated by law may do

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<sup>18</sup>Orend, 52.

<sup>19</sup>“The Universal Declaration of Human Rights,” The United Nations, <http://www.un.org/en/documents/udhr/> (accessed October 6, 2013).

so. A final requirement of proper authority is that the decision must be declared publicly. A democracy in particular bears responsibility to its citizens to inform them of state policy so citizens in turn can provide informed oversight through the electoral process. Entering into a war secretly, or withholding the justification for entering into a conflict subverts this system.

### Right Intention

The third category of *Jus ad Bellum* is right intention. Along with the decision to go to war, the reason for going must be stated and not hidden from the public. Although going to war is not a decision to take lightly, there are times when it is the right decision to make. These reasons must align with the national moral conscience and may include self-defense, national security, or the defense of human life outside one's nation.<sup>20</sup> Having a justifiable reason to go to war, however, is not enough. To truly be a right intention, not only should the objective reason be moral, but the subjective one as well. An example from parenting helps illustrate the difference. When a child apologizes for an incorrect behavior such as lying, it is not enough for him or her to say they are sorry. If said in a curt, offhand manner, then the words are only present to deflect criticism; the child does not mean them. Just as a parent insists a child be sorry, not just say they are sorry, the intentions under right intent must be sincere.

This narrative illustrates not only the importance of having the right motive or intention, but in publicly stating it. The proper authority should clearly state right intent when making a public declaration of the decision to go to war. As Carl von Clausewitz cautions, "no other human activity is so continuously or universally bound up with chance."<sup>21</sup> Before stepping into such an activity, an open, honest declaration of war coupled with a declaration of intent by the appropriate

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<sup>20</sup>Eric Patterson, *Just War Thinking: Morality and Pragmatism in the Struggle Against Contemporary Threats* (New York: Lexington Books, 2007), 35.

<sup>21</sup>Carl von Clausewitz, *On War*, ed. Michael Howard and Peter Paret (Princeton, NJ: Princeton University Press, 1984), 85.



authority not only provides a justifiable reason for going to war, it acts as a statement of intent that will focus the activities of the military by defining the borders of what right looks like.

British Colonel Tim Collins personified this idea in the speech he gave to the 1 Battalion, Royal Irish Regiment on March 29, 2003.

We go to liberate, not to conquer. We will not fly our flags in their country. We are entering Iraq to free a people and the only flag which will be flown in that ancient land is their own. Show respect for them... Iraq is steeped in history. It is the site of the Garden of Eden, of the Great Flood and the birthplace of Abraham. Tread lightly here... As for ourselves, let's bring everyone home and leave Iraq a better place for us having been there.<sup>22</sup>

Though not at the national level, he clearly stated the 1 Battalion, Royal Irish Regiments, purpose for being in Iraq, which set the tone for what was to follow. Right intent also leads into the next category, last resort, because a nation that does not give the political process a chance to work is actively seeking conflict.

### Last Resort

The concept of last resort is one of the most widely misunderstood requirements of just war theory.<sup>23</sup> The title itself, undoubtedly, causes confusion. What is a last resort? If economic sanctions are used, one could continually argue for just one more day, creating a string of last resorts. In other words, there always is another idea to try instead of going to war. Rather than focusing solely on new ideas, a political leader must know how to recognize that he or she is on the road of diminishing returns. Where is the line between giving the political process a chance to avoid war and realizing that the actions taken are not producing results? Matthew Holmes describes this fine line well, stating, "If a sovereign authority has done all it is reasonably

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<sup>22</sup>"Colonel Tim Collins' Iraq War Speech in Full," The Telegraph, <http://www.telegraph.co.uk/comment/3562917/Colonel-Tim-Collins-Iraq-war-speech-in-full.html> (accessed October 6, 2013).

<sup>23</sup>Matthew Holmes, "Just War Theory and Its Applicability to Targeted Killing" (Master's thesis, U.S. Army Command and General Staff College, 2011), 36.

expected to do in order to avoid a war then war itself becomes its last viable option.”<sup>24</sup> Thinking of last resort as a cognitive rather than a temporal last resort may help also, for use “only if other options are judged unlikely to succeed.”<sup>25</sup> Once rational and practical diplomatic efforts fail, or are certain to fail, a levelheaded person can conclude that war is the last available option.

### Probability of Success

Even if war appears to be the last available option, there exists one further option rarely considered: do nothing. In some instances, deciding to go to war is worse than doing nothing, which leads to the requirement of probability of success. This requirement, absent from international law, aims to benefit the population by preventing futile violence. Two problems arise, however. First, success is often hard to gauge. Second, refraining from rewarding aggression is imperative.<sup>26</sup> This is where the UN plays a critical role, justifying the concept’s absence from international law. If a large, strong state unjustly invades a smaller neighbor, the latter can call on UN support (as Kuwait did on 2 August 1990).<sup>27</sup> The UN-sanctioned force that defeated Iraq not only sought to deter aggression and restore the rightful government of Kuwait, but the use of a large multi-national effort ensured probability of success where Kuwait alone could not.

### Proportionality

With probability of success met, the only remaining requirement for *Jus ad Bellum* is proportionality. This requirement focuses on the end state of a conflict and seeks to prevent

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<sup>24</sup>Ibid., 36.

<sup>25</sup>Fisher, 235.

<sup>26</sup>Orend, 58-59.

<sup>27</sup>“22. Items Relating to the Situation between Iraq and Kuwait,” [www.un.org, http://www.un.org/en/sc/repertoire/89-92/Chapter%208/MIDDLE%20EAST/item%2022\\_Iraq-Kuwait\\_.pdf](http://www.un.org/en/sc/repertoire/89-92/Chapter%208/MIDDLE%20EAST/item%2022_Iraq-Kuwait_.pdf) (accessed October 29, 2013).

causing more damage to the enemy populace or one's own than the value received by achieving the end-state. Asking questions about what level of collateral damage was acceptable to free Europe from Nazi Germany puts the problem into perspective, drawing out both the incredible force required and comparing it against the great injustice of the aggressor. These are not easy questions. Each conflict will provide different problems to think through, and the answers for each may be quite different. Examining the end state and the tasks required to achieve it helps mitigate what is, and is not acceptable behavior in a conflict, before any aggression begins. Considering the likely outcome and the resources required also help one to calculate if a war is worth it.<sup>28</sup>

To many, proportionality is a difficult concept to understand. Considering the inverse, or what is disproportionate, is often much easier. Either way, a state's leadership needs to examine the reason for going to war and the benefits derived from it, so that the ends, ways, and means are in line with national strategy. If the perceived value of the conflict is worth pursuing, further questions to consider exist: Are there ways to mitigate the risks to civilians? Is the state willing and able to accept an increased level of risk to military personnel to protect civilians?<sup>29</sup> Approaching a conflict with a realistic set of expectations and pre-determined rules of engagement to prevent disproportionate use of force will help maintain the moral high ground when difficulties arise.

### The Global War on Terror

*Jus ad Bellum* applies to US actions. On September 11, 2001, three aircraft hijacked by Al-Qaeda crashed into New York City's World Trade Center buildings and the Pentagon in

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<sup>28</sup>Holmes, 36.

<sup>29</sup>Michael Walzer, "On Proportionality," New Republic, <http://www.newrepublic.com/article/politics/proportionality> (accessed October 30, 2013).

Virginia. A fourth crashed into a field in Pennsylvania. This, however, was not the first Al-Qaeda attack on the United States. The first attack occurred December 29, 1992 in Yemen, where terrorists bombed a hotel where US forces stayed.<sup>30</sup> Concurrently, Yemeni security arrested al-Qaeda operatives in Yemen who were preparing to shoot down US military aircraft.<sup>31</sup> On February 26, 1993, al-Qaeda attempted to destroy the World Trade Center by detonating a car bomb, killing six and injuring 1,500.<sup>32</sup> Before 9/11, there were actually twenty Al-Qaeda related incidents worldwide, the majority targeting American citizens, resulting in 338 deaths and thousands of wounded.<sup>33</sup> A comparison with the Japanese attack on Pearl Harbor further drives home the magnitude of the attack on 9/11: there were nearly 600 more deaths in 2001 than in 1941.<sup>34</sup> Every state has the right to self-defense, providing ample justification for just cause.

One day after the 9/11 attacks, the United Nations Security Council passed Resolution 1368. It stated the United Nations was “determined to combat by all means threats to international peace and security caused by terrorist acts, recognizing the inherent right of individual or collective self-defence in accordance with the Charter.”<sup>35</sup> Of particular importance, Afghanistan is mentioned nowhere in the resolution. Rather, it stresses that “those responsible for aiding,

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<sup>30</sup>Stanford.edu, “Al-Qaeda,” <http://www.stanford.edu/group/mappingmilitants/cgi-bin/groups/view/21> (accessed January 29, 2014). A bomb was detonated at the Gold Mahur hotel in Yemen and a second was detonated at the Aden Movenpick hotel. US service-members stayed there while en-route to Somalia, but vacated before the attack. Two Australian civilians were killed at Aden Movenpick.

<sup>31</sup>Robert Windrem, “Al-Qaida Timeline: Plots and Attacks,” NBC News.com, [http://www.nbcnews.com/id/4677978/ns/world\\_news-hunt\\_for\\_al\\_qaida/t/al-qaida-timeline-plots-attacks/#.UsDzIvRDvIE](http://www.nbcnews.com/id/4677978/ns/world_news-hunt_for_al_qaida/t/al-qaida-timeline-plots-attacks/#.UsDzIvRDvIE) (accessed December 29, 2013).

<sup>32</sup>Ibid.

<sup>33</sup>Ibid.

<sup>34</sup>Donna Miles, “Pearl Harbor Parallels 9-11,” Military.com, <http://www.military.com/NewsContent/0,13319,120133,00.html> (accessed December 29, 2013).

<sup>35</sup>“Resolution 1368 (2001),” UN.org, <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/N01/533/82/PDF/N0153382.pdf?OpenElement> (accessed December 29, 2013).

supporting, or harboring the perpetrators, organizers, and sponsors of these acts will be held accountable.”<sup>36</sup> Internationally, the passage of UN Security Resolution 1368 met the proper authority requirement. Domestically, the 107<sup>th</sup> Congress met the requirement with the issue of the Joint Resolution six days after the UN Resolution 1368. The Joint Resolution authorized the President “to use all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed, or aided the attacks... or harbored such organizations or persons, in order to prevent any future acts of international terrorism against the United States by such nations, organizations or persons.”<sup>37</sup>

President George W. Bush, receiving authority, issued an ultimatum to the Taliban two days later. In an attempt to avoid armed conflict, he publicly declared, “the Taliban must act and act immediately. They will hand over the terrorists or they will share in their fate.”<sup>38</sup> This speech met the public declaration requirement of proper authority and established the criteria for last resort—criteria the Taliban did not meet. The argument is plausible that the request was unreasonable; the Taliban was not capable of rounding up and turning over al-Qaeda. This idea falls apart under scrutiny however. The Taliban did not attempt to meet the request, and the fact that they were providing sanctuary to a terrorist group in the first place points to their illegitimacy as a government. Under the topic of proper authority, a legitimate state government is required to be minimally just, which means it must strive to effect positive change in regards to human rights and fundamental freedom. Although the Taliban may not have been able to meet the demands on

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<sup>36</sup>Ibid.

<sup>37</sup>“Public Law 107–40—Sept. 18, 2001,” <http://www.gpo.gov/fdsys/pkg/PLAW-107publ40/pdf/PLAW-107publ40.pdf> (accessed December 30, 2013).

<sup>38</sup>“Text: President Bush Addresses the Nation,” *The Washington Post*, [http://www.washingtonpost.com/wp-srv/nation/specials/attacked/transcripts/bushaddress\\_092001.html](http://www.washingtonpost.com/wp-srv/nation/specials/attacked/transcripts/bushaddress_092001.html) (accessed December 30, 2013).

their own, they displayed no intent to do so. In such cases, Immanuel Kant concluded that a forcible regime change is a better solution than allowing unjust regimes to flourish.<sup>39</sup>

The final proper authority requirement is that the United States be a legitimate government, striving to provide at least a minimum level of justice to its citizens. The United States is a nation founded upon the ideas of human rights. Language from US founding documents focuses on two important points: responsibility of the government to uphold unalienable rights, and the concept that states derive “their just powers from the consent of the governed.”<sup>40</sup> The United States continues to adhere to these ideals and clearly represents a legitimate government.

Concerning right intention, the components of self-defense, national security, and the defense of human life outside one’s nation all are clearly visible in both the UN and Congressional resolutions.<sup>41</sup> A just objective is not enough however; the intent behind it must be just. President Bush’s address to the nation made it clear that the intent was not to further US hegemony, but to protect Americans, British, El Salvadorans, Indians, Iranians, Israelis, Japanese, and Mexicans, all of whom died as a result of the 9/11 attacks.<sup>42</sup> Furthermore, the President outlined attacks carried out in Muslim states, in Africa, and elsewhere. Describing the desired end

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<sup>39</sup>Immanuel Kant, *The Metaphysics of Morals*, trans. H.B. Nisbet in H. Reiss, ed. *Kant: Political Writings*, 2nd, ed. (New York: Cambridge University Press, 1991), 170.

<sup>40</sup>“The Declaration of Independence,” USHistory.org, <http://www.ushistory.org/declaration/document/> (accessed December 30, 2013).

<sup>41</sup>Eric Patterson, *Just War Thinking: Morality and Pragmatism in the Struggle Against Contemporary Threats* (New York: Lexington Books, 2007), 35.

<sup>42</sup>“Text: President Bush Addresses the Nation,” The Washington Post, [http://www.washingtonpost.com/wp-srv/nation/specials/attacked/transcripts/bushaddress\\_092001.html](http://www.washingtonpost.com/wp-srv/nation/specials/attacked/transcripts/bushaddress_092001.html) (accessed December 30, 2013).

state of the conflict against al-Qaeda, he clearly described the intent of the Global War on Terror was to end totalitarian oppression and ensure basic human rights worldwide.<sup>43</sup>

Last resort, issued by President Bush in his ultimatum to the Taliban, actually goes back much further. As already stated, the 9/11 attacks were not the first attacks on an American target by al-Qaeda. The attack on the USS Cole, the first attempt on the World Trade Center, and others established al-Qaeda as a threat since 1992.<sup>44</sup> In the spring of 1996, President Clinton signed a top-secret order, which authorized “any and all means to destroy bin Laden’s network.”<sup>45</sup> The Global War on Terror was not the start of anti al-Qaeda action, but the culmination of over five years of various levels of activity. In the case of Afghanistan, the Taliban did not meet President Bush’s demands and the result was Operation Enduring Freedom.

As Afghanistan quickly became an inhospitable base of operations, al-Qaeda fled across the border to Pakistan, a much less willing host.<sup>46</sup> The government of Pervez Musharraf, unlike the Taliban, cooperated with the United States, leading to highpoints such as the capture of Khalid Shaikh Mohammed, the 9/11 mastermind, in a raid led by the Central Intelligence Agency (CIA).<sup>47</sup> US interest in Iraq, however, relieved the pressure on al-Qaeda, allowing it to reestablish itself in Pakistan’s semi-autonomous Federally Administered Tribal Areas (FATA).<sup>48</sup> From there,

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<sup>43</sup>Ibid.

<sup>44</sup>Robert Windrem, “Al-Qaida Timeline: Plots and Attacks,” NBC News.com, [http://www.nbcnews.com/id/4677978/ns/world\\_news-hunt\\_for\\_al\\_qaida/t/al-qaida-timeline-plots-attacks/#.UsDzIvRDvIE](http://www.nbcnews.com/id/4677978/ns/world_news-hunt_for_al_qaida/t/al-qaida-timeline-plots-attacks/#.UsDzIvRDvIE) (accessed December 29, 2013).

<sup>45</sup>“Who Is Bin Laden?” Frontline, <http://www.pbs.org/wgbh/pages/frontline/shows/binladen/etc/cron.html> (accessed December 30, 2013).

<sup>46</sup>Daniel Byman, “The History of Al Qaeda,” Brookings, <http://www.brookings.edu/research/opinions/2011/09/01-al-qaeda-history-byman> (accessed January 1, 2014).

<sup>47</sup>“Top Al Qaeda Operative Caught in Pakistan,” CNN.com, <http://www.cnn.com/2003/WORLD/asiapcf/south/03/01/pakistan.arrests/> (accessed January 1, 2014).

<sup>48</sup>Byman.

it struck out not only against the Afghan government of Hamid Karzai, but against Pakistan's security agencies and military as well.<sup>49</sup> The Tribal Areas have "a long history of fierce independence and lawlessness," and have resisted Pakistani incursion.<sup>50</sup> When the Pakistani military entered FATA territory in 2002, it was "the first time in fifty-five years."<sup>51</sup> Pakistani efforts in South Waziristan, led to "an undeclared war between the Pakistani military and rebel tribesmen," which spread throughout the FATA.<sup>52</sup> Today, "[d]espite the commitment of more than 100,000 troops, the military's efforts have yielded only questionable gains."<sup>53</sup> In North Waziristan, the stalled Pakistani military reached terms in 2006 requiring local Taliban groups such as the Haqqani network to break ties with the anti-government *Tehrik-e-Taliban Pakistan*, but allowing them to continue fighting in Afghanistan.<sup>54</sup>

Pakistan is thus unable to rid itself of the terrorist elements that find sanctuary in the FATA. Realizing the threat posed by the United States, and straddled between an unstable Afghanistan and enemy India, Pakistan decided to cooperate with the United States in a limited way. They would allow US action, but only of a covert nature, in an attempt to balance the various political struggles occurring inside Pakistan. Such cooperation would allow nonmilitary US agencies access to Pakistan, as were already actively involved with the arrest of Khalid Shaikh Mohammed, but would restrict US combat forces from the country. Since the enemy operated in an inaccessible area and US ground forces were not authorized, the only alternative

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<sup>49</sup>Zahid Hussain, "Pakistan's Most Dangerous Place," *The Wilson Quarterly* (Winter 2012). <http://www.wilsonquarterly.com/essays/pakistans-most-dangerous-place> (accessed January 1, 2014).

<sup>50</sup>*Ibid.*

<sup>51</sup>*Ibid.*

<sup>52</sup>*Ibid.*

<sup>53</sup>*Ibid.*

<sup>54</sup>*Ibid.*



was the use of RPAs. These served as a last resort, preventing a potential invasion of the FATA by US forces. Pakistan cooperated where the Afghan Taliban did not. The Pakistani government was not, and still is not, situated on stable ground. To maintain political stability, Pakistani rhetoric would not match Pakistani action. Despite denials, “top officials in Pakistan’s government have for years secretly endorsed the [RPA] program and routinely received classified briefings on strikes and casualty counts.”<sup>55</sup>

An important point to consider is that although the declaration of intent by George W. Bush at the commencement of the Global War on Terror against Afghanistan met the public declaration requirement of proper authority for Afghanistan, there was no further dialog on operations outside Afghanistan.<sup>56</sup> Military action commenced in Pakistan and Yemen without a public declaration, which fails to meet the requirement entirely. The situations in Yemen and Pakistan are understandably complex, and covert *action* is an option available to the United States, but covert *war* should never be an option. According to the Constitution, The US Congress must declare wars.<sup>57</sup> The War Powers Resolution allows the President to use armed forces for a total of sixty days without congressional approval, plus an additional thirty days to withdraw American forces.<sup>58</sup> Neither of these methods were publicly used in Pakistan nor Yemen, breaching the Constitutional covenant with the American people.

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<sup>55</sup>“Secret Memos Reveal Explicit Nature of U.S., Pakistan Agreement On Drones,” *Washington Post*, October 23, 2013, [http://www.washingtonpost.com/world/national-security/top-pakistani-leaders-secretly-backed-cia-drone-campaign-secret-documents-show/2013/10/23/15e6b0d8-3beb-11e3-b6a9-da62c264f40e\\_story.html?wpmk=MK0000203](http://www.washingtonpost.com/world/national-security/top-pakistani-leaders-secretly-backed-cia-drone-campaign-secret-documents-show/2013/10/23/15e6b0d8-3beb-11e3-b6a9-da62c264f40e_story.html?wpmk=MK0000203) (accessed January 1, 2014).

<sup>56</sup>“Text: President Bush Addresses the Nation,” *Washington Post*, [http://www.washingtonpost.com/wp-srv/nation/specials/attacked/transcripts/bushaddress\\_092001.html](http://www.washingtonpost.com/wp-srv/nation/specials/attacked/transcripts/bushaddress_092001.html) (accessed December 30, 2013).

<sup>57</sup>U.S. Constitution, art. 1, sec. 8, cl. 11.

<sup>58</sup>“War Powers,” <http://www.loc.gov/law/help/war-powers.php> (accessed February 3, 2014).

Yemen is similar to Pakistan in that the central government could not effectively govern the entire state. When confronted by President Bush after the 9/11 attacks, especially given that the attack on the USS Cole originated from Yemen, President Ali Abdullah Saleh saw an opportunity. Faced with insurgents in the north and secessionists in the south, the Yemeni president saw an opportunity to gain western backing for his fragile government. In exchange for US Special Forces aid to his country in foreign internal defense and counterterrorism, he allowed RPA operations against terror suspects.<sup>59</sup> As in Pakistan, when faced with the dilemma of a US ultimatum, Yemen sought to cooperate rather than resist, which led to a very different outcome than in Afghanistan.

The US citizenry overwhelmingly supported military action following 9/11; understanding casualties were possible, but believing in the importance and likelihood of success of the mission.<sup>60</sup> The United States maintained a military capable of overwhelming Afghanistan, but it does not appear it expended much thought examining the complex environment. The United States had the capacity to defeat the Taliban and kill or capture a number of suspected terrorists, but al-Qaeda extended beyond Afghanistan, and a defeat there would not equal a defeat everywhere. Defense Secretary Donald Rumsfeld, speaking on September 12, 2001, stated that any effort would have to be “sustained and broadly based.”<sup>61</sup> In haste for quick action, the administration appears to have failed to consider the effects of pushing al-Qaeda out of

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<sup>59</sup>Jonathan Masters and Zachary Laub, “Al-Qaeda in the Arabian Peninsula (Aqap),” Council on Foreign Relations, <http://www.cfr.org/yemen/al-qaeda-arabian-peninsula-aqap/p9369> (accessed January 1, 2014).

<sup>60</sup>David Moore, “Public Overwhelmingly Backs Bush in Attacks On Afghanistan,” Gallup.com, <http://www.gallup.com/poll/4966/public-overwhelmingly-backs-bush-attacks-afghanistan.aspx> (accessed February 1, 2014).

<sup>61</sup>“Text: Rumsfeld On Search for Terrorists,” *Washington Post*, [http://www.washingtonpost.com/wp-srv/nation/transcripts/rumsfeldtext\\_091201.html](http://www.washingtonpost.com/wp-srv/nation/transcripts/rumsfeldtext_091201.html) (accessed January 1, 2014).

Afghanistan, rather than taking more time to close potential escape routes. The United States seemingly entered Pakistan as a contingency to the Afghan conflict, with little to no forethought to the long-term likelihood of success that such restricted policies as RPA-only warfare would allow. To quote secretary Rumsfeld once more, “simply because you do not have evidence that something exists does not mean that you have evidence that it doesn't exist.”<sup>62</sup> Even if the Bush and Obama Administrations reconsidered the criteria of *Jus ad Bellum*, for which there is no evidence, a critical failing of each is the lack of a clear public declaration of intent in both Pakistan and Yemen.

In the case of Yemen, there is a much stronger case for the United States considering the probability of success. Due to Yemen’s physical location, well away from Afghanistan, it demanded attention as its own problem. Rather than relying on RPA operations only, the United States deployed Special Forces to work alongside the CIA and the Department of State to ensure a more whole of government approach. RPAs focused on leadership, while Green Berets worked to strengthen the Yemeni ability to go after terrorists themselves. In both cases, there is no doubt that the United States, with the combined resources of the Department of Defense, the CIA, the Department of State, and more, acted with full confidence in the likelihood of success as each theater of conflict opened up. Whether or not the United States made wise decisions in handicapping itself by limiting offensive operations to airstrikes is another matter, and only tangentially related to *Jus ad Bellum*.

The final aspect of *Jus ad Bellum* to examine is proportionality. The American public thought military action would be worth the amount of American blood and treasure it would cost. A Gallup poll from October 2001 showed ninety percent support for the United States invasion of

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<sup>62</sup>“Press Conference by Us Secretary of Defence, Donald Rumsfeld,” NATO, <http://www.nato.int/docu/speech/2002/s020606g.htm> (accessed January 2, 2014).

Afghanistan.<sup>63</sup> In the aftermath of 9/11, there was a demand that the US bring to justice those responsible, wherever they hid. Since the United States did not declare war on Pakistan or Yemen, early public opinion on them was non-existent. Concurrently taking minor action in two other states, with the support of their governments, to ensure the completion of wiping out al-Qaeda would have likely met with similar approval.

American political leadership clearly supported action in Pakistan and Yemen, even if not overtly stated. President Bush, in his speech on 20 September 2001, stated:

There are thousands of these terrorists in more than 60 countries . . . Our enemy is a radical network of terrorists and every government that supports them. Our war on terror begins with Al Qaeda, but it does not end there. It will not end until every terrorist group of global reach has been found, stopped, and defeated.”<sup>64</sup>

The added costs of Pakistan and Yemen were clearly worth it to the President. In addition, using RPAs for the preponderance of force significantly lowered risk and cost.

When considering the other side of proportionality, both conflicts appeared worth pursuing. RPAs are very accurate; with the CIA and the coordination of Pakistani and Yemeni intelligence agencies, actionable intelligence would allow the targeting of key al-Qaeda members while sparing each state from a large-scale ground operation. The proper use of targeting minimizes collateral damage: “Pre-planned targets are thoroughly vetted in advance of airstrikes to ensure intelligence has identified the correct target and that collateral damage will be held to a minimum . . . In a troops-in-contact situation these safeguards are usually bypassed.”<sup>65</sup> An all-air

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<sup>63</sup>Jonathan Tepperman, “Weighing War, Peace and Polls,” *New York Times*, [http://www.nytimes.com/2013/09/09/opinion/09iht-edtepperman09.html?pagewanted=all&\\_r=0](http://www.nytimes.com/2013/09/09/opinion/09iht-edtepperman09.html?pagewanted=all&_r=0) (accessed January 2, 2014).

<sup>64</sup>“Text: President Bush Addresses the Nation,” *Washington Post*, [http://www.washingtonpost.com/wp-srv/nation/specials/attacked/transcripts/bushaddress\\_092001.html](http://www.washingtonpost.com/wp-srv/nation/specials/attacked/transcripts/bushaddress_092001.html) (accessed December 30, 2013).

<sup>65</sup>Phillip Meilinger “Airpower and Collateral Damage: Theory, Practice and Challenges,” Air Power Australia, <http://webcache.googleusercontent.com/search?q=cache:http://www.ausair-power.net/APA-EMEAC-2013-02.html> (accessed January 2, 2014).

or mostly air operation that pursues only high-level targets has the potential to reduce collateral damage drastically. A Human Rights Watch study on collateral damage revealed that over ninety-five percent of airstrikes producing collateral damage are troops-in-contact situations where the safeguards involved in the targeting process get bypassed.<sup>66</sup> Logically, removing troops-in-contact situations will also remove the overwhelming majority of collateral damage incidents. Overall, the United States displayed a compelling case for *Jus ad Bellum* concerning Pakistan and Yemen. After the 9/11 attacks, the administration believed just cause was displayed, proper authority was exercised publicly, decisions were made with the right intentions, last resort was met, probability of success was high, and it utilized a proportional plan.

### *Jus in Bello*

*Jus ad Bellum* concerns the ethical implications of going to war, but once involved, *Jus in Bello* or justice in war is the focus. Most theorists draw a distinction between the two, since one focuses on the political domain while the other the military domain. Since politicians make the decision to commit a nation to war, and the military conducts the war, judging a military based on the criteria of *Jus ad Bellum* is unfair. The military is responsible for the actions taken once hostilities begin.<sup>67</sup> This does not mean the two should be separated; according to Brian Orend, only a just war, justly fought, is acceptable. All three categories must “be linked, with *Jus ad Bellum* setting the tone for all that follows.”<sup>68</sup> However, one must concede that a military, even one fighting in an unjust war, still can fight justly. When considering the conduct of war, *Jus in Bello*

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<sup>66</sup>Ibid.

<sup>67</sup>Michael Walzer, *Just and Unjust Wars*, 3rd ed. (New York: Basic Books, 1977), 38-39.

<sup>68</sup>Orend, 105.

dictates that any harm caused by a military action must be proportionally less than the good achieved and that military forces should never deliberately attack non-combatants.<sup>69</sup>

Saying that any harm caused needs to be less than the overall good achieved is easy, but planning and execution is much more difficult. Critical considerations include deciding what is proportional in specific instances as well as overall. Problems such as the number of acceptable non-combatant deaths resulting from an attack on a legitimate target need to be answered, and these answers affect where and when operations will take place. Another critical consideration is how to conduct operations if the combatants do not distinguish themselves from civilians.

### Discrimination

Quite possibly the most influential contribution to international law concerning warfare is the concept of discrimination. Michael Walzer summed up the basis of the concept, also known as non-combatant immunity: “A legitimate act of war is one that does not violate the rights of the people against whom it is directed . . . No one can be forced to fight or to risk his life, no one can be threatened with war or warred against, unless through some act of his own he has surrendered or lost his rights.”<sup>70</sup> Therefore, according to Walzer, a war only can be conducted against the armed forces of the opposing state, consisting of the men and women who relinquish their non-combatant status either voluntarily in a professional military or by draft, universal conscription, or some coercive method. This distinction is worth making: those forced into military service are still lawful combatants though it was not a voluntary process. The conclusion is that combatants are separate and distinct from the rest of society. They receive the right to take up arms and kill in the service of the state, but lose protection from reciprocal violence.

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<sup>69</sup>Fisher, 67.

<sup>70</sup>Walzer, *Just and Unjust Wars*, 135.

In practice, when conflict breaks out, combatants on either side may violate the “territorial integrity and political sovereignty of the” of the other state, “but its soldiers cannot violate the life and liberty of enemy civilians.”<sup>71</sup> Walzer’s definition of combatant, although a critical starting point, falls a little short. What about the civilians that, although not directly involved in combat, still are an important part of the war effort; are the politicians responsible for starting the war, defense industry workers, or specialized workers such as civilian air traffic controllers immune from combat? Brian Orend describes a legitimate target as “anyone or anything engaged in harming.”<sup>72</sup> David Fisher goes one-step further, to include those who threaten harm.<sup>73</sup> The International Committee of the Red Cross (ICRC) sought to bring clarification to this topic with the release of *Direct Participation in Hostilities* (DPH).

In doing so, the ICRC sought to bring clarity to rule six of Customary International Humanitarian Law (IHL): “Civilians are protected against attack, unless and for such time as they take a direct part in hostilities.”<sup>74</sup> That this rule needs clarity speaks to the increase of civilian participation in combat and more importantly, the rise of non-state groups that participate in combat without distinguishing themselves as combatants.<sup>75</sup> To ensure the principle of discrimination is observed, “It is necessary that the armed forces of parties to an armed conflict – whether international or non-international – be distinguished from civilians, and that civilians who never take a direct part in hostilities be distinguished from those who do so on an individual,

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<sup>71</sup>Ibid., 137.

<sup>72</sup>Orend, 107.

<sup>73</sup>Fisher, 78.

<sup>74</sup>“Rule 6. Civilians’ Loss of Protection from Attack,” ICRC, [http://www.icrc.org/customary-ihl/eng/docs/v1\\_rul\\_rule6](http://www.icrc.org/customary-ihl/eng/docs/v1_rul_rule6) (accessed November 13, 2013).

<sup>75</sup>Nils Melzer, *Direct Participation in Hostilities* (Geneva: International Committee of the Red Cross, 2009), 5, <http://www.icrc.org/eng/assets/files/other/icrc-002-0990.pdf> (accessed November 13, 2013).

sporadic, or unorganized basis only.”<sup>76</sup> Failure to do so is a failure to meet the requirement of distinction that blurs the line between who is rightfully a combatant and who is not. Britain’s *Manual of Military Law* states plainly, “An individual must definitely choose to belong to one class or the other, and shall not be permitted to enjoy the privileges of both.”<sup>77</sup>

To qualify as DPH, an act must meet three successive criteria:

1. the act must be likely to adversely affect the military operations or military capacity of a party to an armed conflict or, alternatively, to inflict death, injury, or destruction on persons or objects protected against direct attack (threshold of harm), and
2. there must be a direct causal link between the act and the harm likely to result either from that act, or from a coordinated military operation of which that act constitutes an integral part (direct causation), and
3. the act must be specifically designed to directly cause the required threshold of harm in support of a party to the conflict and to the detriment of another (belligerent nexus).<sup>78</sup>

A civilian who decides to engage directly in hostilities suspends his or her right to discrimination from the effects of combat.<sup>79</sup> This concept of DPH is not limited to pulling the trigger; an individual supplying ammunition to those engaged in hostilities is just as culpable.<sup>80</sup>

When applying this logic to an organization, such as al-Qaeda, whose purpose is to conduct acts of violence that meet the three rules above, all individuals “recruited, trained and equipped...to continuously and directly participate in hostilities on its behalf can be considered to assume a continuous combat function even before he or she first carries out a hostile act.”<sup>81</sup>

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<sup>76</sup>Ibid, 6.

<sup>77</sup>Walzer, *Just and Unjust Wars*, 179.

<sup>78</sup>Nils Melzer, *Direct Participation in Hostilities* (Geneva: International Committee of the Red Cross, 2009), 5, <http://www.icrc.org/eng/assets/files/other/icrc-002-0990.pdf> (accessed November 13, 2013), 46.

<sup>79</sup>Ibid, 12.

<sup>80</sup>Ibid, 56.

<sup>81</sup>Ibid, 34.



Political or other members who support the group, but do not meet DPH criteria, maintain their protection based on distinction.

All combatants are lawful targets, regardless of whether or not they follow the law of armed conflict. Other lawful targets, besides combatants, are military hardware such as tanks, aircraft, weapons caches, etc. Political leadership and bureaucratic institutions that serve to command and control military forces are legitimate targets also. Further, supply routes and even some suppliers or industries, directly related to the manufacture of military hardware or dual use items, may be targeted.<sup>82</sup> Walzer suggests the best way to distinguish acceptable industrial targets. He states, “The relevant distinction is not between those who work for the war effort and those who do not, but between those who make what soldiers need to fight and those who make what they need to live, like all the rest of us.”<sup>83</sup> An important caveat is that the factory is a legitimate target, not the workers. They do not meet the requirements of DPH. This does not mean they cannot be killed, only that they cannot be targeted, at home or at work.<sup>84</sup> The legitimate target is the factory, and if an ensuing attack kills workers, they are unfortunate collateral damage.

If workers cannot be targeted, how is it acceptable for them to be killed? In war, drawing distinction between the intent of an action and the consequences produced is often necessary. One of the critical tools used to test whether an act is acceptable or not in *Jus in Bello* is the Doctrine of Double Effect.<sup>85</sup> The root of the Double Effect problem is that a military can target only legitimate targets, but unfortunately, legitimate targets often are situated next to public places and

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<sup>82</sup>Orend, 114.

<sup>83</sup>Walzer, *Just and Unjust Wars*, 146.

<sup>84</sup>Ibid, 146.

<sup>85</sup>Orend, 115.

occupied by non-combatants. Thus, targeting them may cause the death of non-combatants or the destruction of their property, referred to as collateral damage. Such a target can still be attacked, although the non-combatants maintain their rights to not be targeted. An operator may foresee both positive and negative effects from bombing a target, yet may continue if action meets three criteria. First, the target must be a legitimate target. For example, consider a munitions factory. Second, the attacker must intend only the good effects, not the bad. In the case of the munitions factory, the intent must be the decommissioning of the factory, not the death of its workers. Further, the negative effects cannot be a means to the positive. Although targeting the cafeteria at lunch would remove much of the required workforce, and would thereby decommission the factory, the action is prevented by this rule, because it uses negative effects to achieve the positive results desired. Third, the good effects must outweigh the bad secondary effects; the factory could be attacked at night to reduce casualties. In other words, the action must be proportional.<sup>86</sup>

### Proportionality

The final *Jus in Bello* criteria is proportionality, which is different from the *Jus ad Bellum* criteria of proportionality in that it focuses on the tactical level in war itself. Rather than concerning itself with desired outcomes, this concept of proportionality accepts that war has begun, and restricts the level of force used in a conflict. This concept strikes both Walzer and Orend as difficult to define; they state that it is easier to point out a disproportionate use of force.<sup>87</sup> Overall, force should be used wisely, limited to what is needed to achieve victory and

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<sup>86</sup>Ibid., 115.

<sup>87</sup>Ibid., 119.

ruling out wanton destruction.<sup>88</sup> This is not something easily achieved however, because it is difficult to forecast just how much force is required to achieve an objective.

On the topic of proportionality, Henry Sidgwick formulated Sidgwick's Rule, which reminds a combatant to be ever mindful of the desired end state. His twofold rule states that one should not do: "(1) any mischief which does not tend materially to this end, nor (2) any mischief of which the conduciveness to the end is slight in comparison with the amount of the mischief."<sup>89</sup> Using this idea, joint targeting doctrine requires that agents "take precautions to minimize collateral injury to civilians and protected objects or locations."<sup>90</sup> This does not mean no collateral damage is acceptable, but it must be reasonable in comparison to the military objective achieved. Thirty civilians killed in a firefight that captured one enemy combatant would surely be excessive, while thirty civilians killed in the destruction of an enemy air base might prove acceptable. The act must move the agent involved toward victory while avoiding significant damage, both immediate and potential long-term.<sup>91</sup>

This may appear haphazard or inconsistent to a casual observer, but something deeper and more important from the long-term perspective of the war is at focus here: public perception. Gaining the trust of civilians is critical to prevent an insurgency and to keep the war as short as possible with the least disruption to society as a whole. That goal is impossible if the people believe that the combatants do not have their interests in mind. A legitimate government does not kill civilians without due process, and while war is outside the realm of normality, combatants

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<sup>88</sup>Walzer, *Just and Unjust Wars*, 129.

<sup>89</sup>Henry Sidgwick, *The Elements of Politics*, 7th ed. (Cambridge: Adamant Media Corporation, 2000), 241.

<sup>90</sup>*Joint Publication 3-60: Joint Targeting* (Washington, DC: Joint Chiefs of Staff, 2007), E-2, [http://www.aclu.org/files/dronefoia/dod/drone\\_dod\\_jp3\\_60.pdf](http://www.aclu.org/files/dronefoia/dod/drone_dod_jp3_60.pdf) (accessed November 18, 2013).

<sup>91</sup>Walzer, *Just and Unjust Wars*, 129.

must do their utmost to gain local buy-in by limiting civilian casualties and property destruction to the absolute minimum to achieve worthwhile objectives. The overall goal is the speedy pursuit of peace while avoiding “the danger of provoking reprisals and of causing bitterness that will long outlast” the current conflict.<sup>92</sup>

Proportionality is also exercised through international agreements. Adherence to international war conventions is one of the most important methods of ensuring a just war with a lasting peace. Violence, uncertainty, “fear, and hysteria are always latent in combat, often real, and they press us toward fearful measures and criminal behavior. The war convention is a bar to such measures.”<sup>93</sup> In general, conventions such as those agreed upon in Geneva, seek to protect human rights and eliminate indiscriminant or inhumane means. In other words, they limit and shape both ways and means. If a convention is “morally plausible to large numbers of men and women” and it “correspond[s] to ours sense of what is right,” abiding by it helps ensure both proportionality and legitimacy.<sup>94</sup> “An army warring against aggression can violate the territorial integrity and political sovereignty of the aggressor state, but its soldiers cannot violate the life and liberty of enemy civilians.”<sup>95</sup>

#### Warfare in Pakistan and Yemen

Examining how the requirements of *Jus in Bello* apply to the conflicts in Pakistan and Yemen is difficult, given the covert nature of each. Regardless, actions taken by the United States leave footprints, even if there are no ground forces participating. When considering the requirement of discrimination, many are unclear on the status of al-Qaeda and other terrorist

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<sup>92</sup>Sidgwick, 264.

<sup>93</sup>Walzer, *Just and Unjust Wars*, 251.

<sup>94</sup>*Ibid.*, 133.

<sup>95</sup>*Ibid.*, 137.

organization members, since they do not belong to a state military. First, Just War Theory predates the treaty of Westphalia, and is not limited to state-on-state conflict. It is much more realistic, realizing conflict often rises between groups.<sup>96</sup> Second, according to DPH criteria, anyone “recruited, trained, and equipped,” by al-Qaeda or another terrorist network “to continuously and directly participate in hostilities on its behalf,” is a combatant.<sup>97</sup>

The biggest problem with determining whether the United States is discriminate in its use of force is the complete lack of transparency. All action taken by the United States in Pakistan or Yemen, especially RPA operations, are covert; there are no public documents available. Organizations such as the New America Foundation (NAF), the Long War Journal (LWJ), and The Bureau of Investigative Journalism (TBIJ) have filled in where governmental openness did not (see table 1).

Table 1: Estimate of US RPA Strikes and Fatalities in Pakistan and Yemen.<sup>98</sup>

Pakistan, 2004-2012					
Sources	Number of Strikes	Total Killed	Civilians Killed	Percentage of Civilians Killed	Civilians Killed per Strike
LWJ	325	2,592	142	5	0.44
NAF	340	2,572	175	7	0.51
TBIJ	358	3,019	681	23	1.90
Average	341	2728	333	8	0.98
Yemen, 2002-2012					
LWJ	59	386	82	21	1.39
NAF	42	655	44	7	1.05
TBIJ	59	724	54	8	0.92
Average	53	588	60	10	1.13

Each has published estimates of drone strike fatalities in Pakistan and Yemen. Although the figures do vary, two out of three sources provide a consistent pattern in each theater, with the

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<sup>96</sup>Holmes, 34.

<sup>97</sup>Nils Melzer, *Direct Participation in Hostilities* (Geneva: International Committee of the Red Cross, 2009), 5, <http://www.icrc.org/eng/assets/files/other/icrc-002-0990.pdf> (accessed November 13, 2013), 34.

<sup>98</sup>Micah Zenko, *Reforming U.S. Drone Strike Policies* (New York: Council on Foreign Relations, 2013), 13.

third declaring much higher civilian casualties. In the case of Pakistan, LWJ and NAF sources provide a fairly consistent data pool for the conflict, with TBIJ portraying a much higher civilian death rate per strike. In Yemen, NAF and TBIJ data correlates, while LWJ shows a much higher rate of civilian deaths per strike.

Overall, the statistics show that civilian deaths in Pakistan and Yemen are significantly smaller than the number of combatants killed. Statistics are difficult to understand however, without some sort of comparative context. In Desert Storm, a war supported by a wide international coalition, which received wide public support, 3,500 civilians died along with the 56,000 Iraqi soldiers killed in combat.<sup>99</sup> For comparison, that equals a 6.25 percentage of civilians killed, only slightly less than in Pakistan and Yemen. In the air war against Serbia in the Kosovo conflict, there were over 9,300 strikes resulting in over 5,000 civilian casualties (including those who died from loss of power, fire, and other indirect causes directly resulting from the airstrikes).<sup>100</sup> That equates to 0.54 civilians killed per strike, which is just above the low end from Pakistan.

When making these comparisons, there are three critical differences between Desert Storm, Kosovo, and Pakistan/Yemen. RPAs did not participate in an attack role until the Global War on Terror. Secondly, Desert Storm and Kosovo were both international armed conflicts, where in Pakistan and Yemen, each state invited in US forces to support domestic antiterrorist efforts.<sup>101</sup> Thirdly and more importantly, the enemy in the earlier two conflicts abided by the principle of distinction; they wore uniforms to mark themselves as combatants. Considering the

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<sup>99</sup>Jack Kelly, "Estimates of Deaths in First War Still in Dispute," <http://old.post-gazette.com/nation/20030216casualty0216p5.asp> (accessed January 3, 2014).

<sup>100</sup>"The Crisis in Kosovo," Human Rights Watch, <http://www.hrw.org/reports/2000/nato/Natbm200-01.htm> (accessed January 4, 2014).

<sup>101</sup>"Rule 3. Definition of Combatants," International Committee of the Red Cross, [http://www.icrc.org/customary-ihl/eng/print/v1\\_cha\\_chapter1\\_rule3](http://www.icrc.org/customary-ihl/eng/print/v1_cha_chapter1_rule3) (accessed January 4, 2014).

difficulties caused by participating in a non-international conflict, under host nation restrictions, facing an enemy who does not distinguish himself/herself from and hides in the midst of civilians, it is surprising that civilian casualties are so low.

Just because civilian casualties are reasonable, falling more or less in line with other recent conflicts, the burden rests on the government to avoid targeting non-combatants. The United States may be doing this in Pakistan and Yemen, but it is failing by not publicly releasing strike data. In Iraq and Afghanistan, the use of RPA platforms in strike missions averted controversy because RPAs adhered to the same operational and administrative rules as all other combat aircraft.<sup>102</sup> Such openness would reveal the extent to which the United States is taking effort to discriminate, but the covert nature of the action removes the administration from any critical analysis and critique. When questioned, the United States maintains the ability to say that no “strike operations [are] being conducted in Pakistan.”<sup>103</sup> The secrecy surrounding each conflict greatly hampers the effort, but according to the statistics supplied by the Long War Journal and other organizations, the United States has done an excellent job of limiting civilian casualties. During most strikes, civilian deaths are a vast minority, the target is important, and the actions are consistent with the Doctrine of Double Effect described above. Discrimination is obviously a priority, but the lack of openness from a democratically elected government regarding what have become two theaters of conflict is troubling. Covert action is one thing—two decade long covert wars are quite another.

Occasionally, however, there is an attack that stands out as indiscriminate or one against targets who clearly do not meet the requirement of being a top tier of leadership as articulated by

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<sup>102</sup>Marc Pitzke, “Remote Warriors: How Drone Pilots Wage War,” Spiegel.de, <http://www.spiegel.de/international/world/remote-warriors-how-drone-pilots-wage-war-a-682420.html> (accessed February 1, 2014).

<sup>103</sup>Jeremy Scahill, “The Secret Us War in Pakistan,” TheNation.com, <http://www.thenation.com/article/secret-us-war-pakistan#> (accessed February 1, 2014).

the Obama Administration. A recent article, based on leaked documents, claims that half of RPA strikes are not even against al-Qaeda.<sup>104</sup> Pakistan and Yemen may be partly responsible. As cited before, Yemen and Pakistan desired help with separatist and/or insurgent forces internal to their own state. These groups are not all aligned with al-Qaeda, but in some cases pose a bigger threat to their state.<sup>105</sup> Because of the relationship with Pakistani and Yemeni intelligence, the idea that not all targets recommended by the two states are strictly al-Qaeda targets is plausible. There is evidence that Pakistan selected many, if not all of the targets for attack during the Bush era.<sup>106</sup> A quid pro quo relationship, where each side brings its capabilities to the table and agrees to work for the betterment of all involved, is not unusual. In either case, each regime is too fragile to remove insurgents on its own, and allowing Americans to do their work for them provides an alibi. An excellent example of this is a 2009 cruise missile attack in Yemen that killed forty-one Bedouins in addition to fourteen militants.<sup>107</sup> Despite the seemingly disproportionate use of force, Yemeni officials did not seek to hold the United States responsible. Due to the secret nature of the program, determining the degree to which US officials sought to avoid targeting non-combatants is not possible. The preponderance of reports makes it look like they do a very good job, although

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<sup>104</sup>“Leaked Report: Nearly Half of Us Drone Strikes in Pakistan Not Against Al-Qaeda,” RT.com, <http://rt.com/news/drones-us-al-qaeda-militants-649/> (accessed January 4, 2014).

<sup>105</sup>Jonathan Masters and Zachary Laub, “Al-Qaeda in the Arabian Peninsula (Aqap),” Council on Foreign Relations, <http://www.cfr.org/yemen/al-qaeda-arabian-peninsula-aqap/p9369> (accessed January 1, 2014).

<sup>106</sup>“Leaked Report: Nearly Half of Us Drone Strikes in Pakistan Not Against Al-Qaeda,” RT.com, <http://rt.com/news/drones-us-al-qaeda-militants-649/> (accessed January 4, 2014).

<sup>107</sup>“US/Yemen: Investigate Civilian Deaths from Airstrikes,” Human Rights Watch, <http://www.hrw.org/news/2013/12/17/usyemen-investigate-civilian-deaths-airstrikes> (accessed January 4, 2014).



actions such as the targeting of a wedding procession on December 12, 2013 paint a different picture.<sup>108</sup>

Proportionality is an even more difficult concept to examine. Determining how much force to use, without using too much, is not an easy task. Looking again at Sidgwick's Rule, one must not do: "(1) any mischief which does not tend materially to this end, nor (2) any mischief of which the conduciveness to the end is slight in comparison with the amount of the mischief."<sup>109</sup> The first step then, is to define the ends. In Pakistan and Yemen, however, one has to deduce the end-state because of the lack of open-source material. Again, in a democracy, the government has a responsibility to be transparent to its citizens. Thomas Jefferson firmly believed that, "If we are to guard against ignorance and remain free, it is the responsibility of every American to be informed."<sup>110</sup> The American people cannot be informed on an issue if the government does not hold up its end of the bargain. Despite the lack of information, there is an apparent strategy of attrition in Pakistan and Yemen. The US end state appears to be a weak and disorganized al-Qaeda, which is no longer capable of major action on the world stage. Systematic destruction of leadership and concentrated groups of al-Qaeda members in so-called "signature strikes" is both a sensible and proportionate (as far as targeting is concerned) way to achieve that end.<sup>111</sup> In these actions, the United States appears to be adhering to international agreements on the conduct of

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<sup>108</sup>Ibid.

<sup>109</sup>Sidgwick, 241.

<sup>110</sup>Thomas Jefferson "If We Are to Guard Against Ignorance...", Monticello.org, <http://www.monticello.org/site/jefferson/if-we-are-to-guard-against-ignorance-quotations> (accessed February 1, 2014).

<sup>111</sup>"Leaked Report: Nearly Half of Us Drone Strikes in Pakistan Not Against Al-Qaeda," RT.com, <http://rt.com/news/drones-us-al-qaeda-militants-649/> (accessed January 4, 2014).

war. A few cases are suspect, but appear to be either a case of enemy propaganda or a missile malfunction, such as the grandmother killed picking okra with her granddaughter.<sup>112</sup>

Proportionality, however, is an attempt to protect society as a whole from the hazards of war. In an insurgency, earning the trust of the populace and reinforcing the legitimacy of the government is critical to prevent the continuing cycle of insurgent recruitment. As stated, a legitimate government must limit civilian casualties and property destruction to the absolute minimum to achieve worthwhile objectives. Achieving objectives in a relatively short amount of time is one of the best ways to achieve this. Here, the United States is failing badly. America has been involved in Pakistan and Yemen for three times longer than it was involve in World War II, and no end is in sight. Unfortunately, tactics appear to be “driving strategy rather than the other way around.”<sup>113</sup> Decapitation has destroyed terrorist groups in past efforts, but they were “hierarchically structured, characterized by a cult of personality...and they lacked a clear succession plan.”<sup>114</sup> Al-Qaeda is a very different organization, demonstrating an ability to replace leadership positions on numerous occasions.

The slow, but prolonged effort has killed about seventy-five percent of key al-Qaeda leaders in Pakistan, but it has also allowed the organization to leave the area, expanding in Yemen and North Africa.<sup>115</sup> Although RPA strikes have made the areas in question safer, by causing terrorists to change their behavior and focus on survival, As *Sahab*, the al-Qaeda propaganda

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<sup>112</sup>Ryan Devereaux, “Family of Grandmother Killed in Us Drone Strike Arrive for Congress Visit,” TheGuardian.com, <http://www.theguardian.com/world/2013/oct/27/drones-attack-pakistan-family-rehman-congress> (accessed February 1, 2014).

<sup>113</sup>Audrey Cronin, “Why Drones Fail,” *Foreign Affairs* 92, no. 4 (July/August 2013): 44.

<sup>114</sup>*Ibid*, 45.

<sup>115</sup>*Ibid*, 45.

wing, has effectively spun the strikes as “indiscriminate violence against Muslims.”<sup>116</sup> The result is that only seventeen percent of Pakistanis approve of RPA strikes against extremist leaders, according to a 2012 Pew poll.<sup>117</sup> While the long war appears to be slowly isolating the United States in Pakistan, a recent article from *The Economist* argues otherwise. The article highlights a private narrative that runs counter to the public one. When interviewing twenty residents from the FATA region, many were actually in favor of RPA operations, stating that they are preferential to other means with low collateral damage. One North Waziristan elder claimed, “No one dares tell the real picture. Drone attacks are killing the militants who are killing innocent people.”<sup>118</sup> Reports differ in both Pakistan and Yemen, with some claiming there is quiet support for RPA strikes, while others warn of a slowly growing resentment, which hurts counter-insurgency operations.<sup>119</sup> One thing is indisputable; the residents of the FATA and Southern Yemen live in fear, because neither the state, the United States, nor al-Qaeda is playing the role of a minimally just government, ensuring their basic human rights.<sup>120</sup> The only redeeming feature to the lack of a coherent strategy and poor public image is that al-Qaeda is doing no better; eighty-five percent of those killed by the terrorist organization are other Muslims.<sup>121</sup>

Perhaps the most telling critique of US actions in regards to *Jus in Bello* are the current governments of Pakistan and Yemen, both of which have undergone significant internal change and are now budding democracies. In October of 2013, Pakistan released figures on RPA strikes,

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<sup>116</sup>Ibid, 45-46.

<sup>117</sup>Ibid, 49.

<sup>118</sup>“Drop the Pilot,” *The Economist*, October 19th-25th 2013, 44.

<sup>119</sup>Cronin, 51.

<sup>120</sup>Ahmed Mujeeb, “Inside Pakistan's Drone Country,” BBC News, <http://www.bbc.co.uk/news/world-asia-india-19714959> (accessed January 4, 2014).

<sup>121</sup>Cronin, 47.

stating that in 2008, only three percent of deaths were civilians.<sup>122</sup> The Pakistani Defense Ministry records stated that since 2004, 378 RPA strikes resulted in 2,160 terrorist and only sixty-seven civilian deaths, and have effectively put al-Qaeda on the defensive.<sup>123</sup> Not only is three percent significantly less than the statistics provided by independent organizations, but also less than the previous Pakistani government claimed.<sup>124</sup> The same holds true for Yemen. Even after a change in government, the new president continues to support US RPA operations.<sup>125</sup>

### *Jus post Bellum*

The third major component to Just War Theory is a modern addition, which focuses on the critical phase of a conflict's termination. The underlying principle is that a just war must lead toward "the vindication of those rights whose violation grounded the resort to war in the first place."<sup>126</sup> Vindication of rights, however, is not enough. The goal of a just war should be a lasting peace between the belligerents involved. A punitive peace agreement, like the Treaty of Versailles, may do more to prolong conflict than ensure the peace by creating conditions unbearable to one party. To ensure a just ending to a just war, the following topics must be addressed: Proportionality and Publicity, Rights Vindication, Discrimination, Punishment,

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<sup>122</sup>"Pakistan Says Only 3% of Drone Strike Victims Were Civilians," RT.com, <http://rt.com/news/pakistan-strikes-killed-civilians-016/> (accessed January 4, 2014).

<sup>123</sup>Bruce Riedel, "Drone Strikes and the U.S.-Pakistan Relationship," Brookings, <http://www.brookings.edu/research/opinions/2013/11/05-drone-strikes-us-pakistan-relationship-riedel> (accessed January 4, 2014).

<sup>124</sup>Ibid.

<sup>125</sup>"Yemen's President Backs Us Terror Drone Strikes," Press TV, <http://www.presstv.com/detail/2013/08/24/320181/yemen-president-backs-us-terror-drones/> (accessed January 2, 2014).

<sup>126</sup>Orend, 163.

Compensation, and Rehabilitation.<sup>127</sup> Any termination criteria must be proportional; states must seek a reasonable end state agreeable to by the other side. Rights vindication of the state, or the restoration and recognition of the rights violated by the aggressor rather than revenge, is the proper goal.<sup>128</sup> Public release of the terms will serve to hold both sides accountable.

The final three topics relate to the idea of reparations and restitution. The victim may be entitled to compensation, but payments should be discriminate, going directly to individuals identified by an accepted legal establishment rather than to broad groups. Further, a distinction between those responsible for the war, those who fought in it, and the people, provides clarity concerning who restitution should come from. Hurting the people of the aggressor state goes beyond restitution, making the victim the aggressor. Those responsible for starting the war should provide reasonable amends. Reparations however, should not be so great that they limit the ability of the aggressor state to govern, potentially destabilizing the area. Punishment should be limited to the leadership of the aggressor state for blatant rights violation, and to combatants from both sides in the case of war crimes. These trials must be fair, public, and international to make the peace process credible.<sup>129</sup> Finally, the aggressor regime may undergo some form of rehabilitation, depending on its functionality, to create a more responsible government.<sup>130</sup>

Overall, the goal of *Jus post Bellum* is to create a stable, permanent peace. Planning from both military and political perspectives, to account for termination criteria, end states, and the peace that will follow, can accomplish this, but only if it starts at the beginning of the process and receives enough attention. Without a fair, publicly proclaimed termination criteria, “belligerents

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<sup>127</sup>Ibid., 180-181.

<sup>128</sup>Ibid., 163.

<sup>129</sup>Ibid., 181.

<sup>130</sup>Ibid., 197.

will be sorely tempted to keep using force to jockey for position.”<sup>131</sup> Worse, it leaves open the possibility that a state can fight a just war, justly, only to lose the peace. The sacrifices made in war demand more than to leave the end to chance.

### When Does it Stop?

*Jus post Bellum* is by far the largest failing of the current strategy adopted by the United States in Pakistan and Yemen. One cause for this failing is that the war is not between two states, but one state and an organization dedicated to expelling infidels.<sup>132</sup> Coming to a peace agreement with the United States would run counter to the very purpose of al-Qaeda. This logical assumption appears to be why the United States has not released any termination criteria. Governmental policy should not be based on assumption, however, and termination criteria should be publicly released. That both conflicts remain covert, kept secret from the American people, may also be a reason why no termination criteria exist in the public realm. Regardless, a reasonable set of termination criteria, designed to guarantee the safety of the American people from future terrorist attacks, publicly released, would grant the United States the moral high ground. Unfortunately, it would also grant a level of legitimacy to al-Qaeda, which the US is not willing to do. There is no official dialog between the two sides, whatsoever. Airstrikes quickly follow up the discovery of an al-Qaeda leader’s location.

An unwillingness or inability to come to terms with al-Qaeda leaves only one goal for the United States to pursue, the elimination of al-Qaeda as an effective organization. Rather than pursuing this end-state aggressively, the US is content to seek total-war aims with what Admiral

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<sup>131</sup>Ibid., 161.

<sup>132</sup>“Al-Qaeda in Hot Spots,” Al Jazeera, [www.aljazeera.net/mritems/streams/2010/2/16/1\\_972108\\_1\\_51.pdf](http://www.aljazeera.net/mritems/streams/2010/2/16/1_972108_1_51.pdf).

Dennis Blair described as a “Whac-A-Mole” limited-war strategy.<sup>133</sup> If RPAs kill enough al-Qaeda members, especially those in key leadership position, the organization may cease to exist or function. Unfortunately, for the US, the Pakistani government does not share that goal, but rather desires the preservation of Islamic extremist groups as a hedge against Shi’a Iran and India in Kashmir.<sup>134</sup> Although supporting the United States now, Pakistan supported the Taliban to maintain a friendly government in Afghanistan that would help counterbalance Iranian influence.<sup>135</sup> In short, Pakistan will not eradicate militant Islam from the FATA region. Pakistan will work with the US to limit the strength of groups like al-Qaeda, to ensure their power does not grow past an acceptable level, but Pakistan’s overall regional security is tentative. It fears United States collaboration with India, and so desires to keep a Sunni ally in its corner.<sup>136</sup> The US will not achieve an unconditional surrender until it presses the enemy relentlessly by all available means, not giving it time to seek a new haven and reconstitute. Limited means do not achieve absolute victory against an enemy fighting a total war.

In Yemen, the United States also desires complete victory with minimal input. After the Iraq quagmire, the US government is hesitant to commit forces to a new theater, especially with a large number of service members still in Afghanistan. Unfortunately, one cannot wish enemies away. With the level of instability present in Yemen, especially after the change in government brought by the Arab spring, only a strong counterinsurgency effort, preferably headed by the United Nations to lend international legitimacy, can remove the chaos and poverty that is

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<sup>133</sup>Medea Benjamin, *Drone Warfare: Killing by Remote Control* (New York, NY: Verso, 2013), 209.

<sup>134</sup>Moeed Yusuf, “The U.S.-Pakistan Relationship and Finding an End State in Afghanistan,” Combating Terrorism Center, <http://www.ctc.usma.edu/posts/the-u-s-pakistan-relationship-and-finding-an-end-state-in-afghanistan> (accessed January 6, 2014).

<sup>135</sup>*Ibid.*

<sup>136</sup>*Ibid.*

incubating Islamic militarism.<sup>137</sup> Simply averting one's eyes from domestic instability and rising militancy makes for poor strategy, as the United States should have learned from Iraq. Like in Pakistan, "Whac-A-Mole" will not defeat the al-Qaeda threat. Defeating an enemy committed to its cause requires more than limited air operations, and the United States, though having a just reason to go to war and fighting in a just manner, is not acting justly in *Jus post Bellum*. Rather than earning rights vindication, guaranteeing freedom from attack from our enemy, it has subjected the FATA region of Pakistan and Yemen to a decade plus of warfare, violating the rights of their citizens in the process. War is understandable when it comes about after a watershed event like 9/11, but subjecting others to unending war does not balance the scale or rid the world of terrorists. It gives al-Qaeda time to recover before the next strike while depriving the innocent in many occasions of "life, liberty, and security of person."<sup>138</sup> Rather than defeating the enemy, the United States is becoming the enemy, acting like an aggressor.

## CONCLUSION

Although many would like to think otherwise, the world is not black and white. Although extremes of black and white do exist, many problems fall somewhere in the middle—somewhere in the varying shades of grey. At times, acting in a convenient way that will achieve a desired end state may seem desirable, even if the path taken is not just. Decrying a crisis as a "supreme emergency," thereby allowing the ends to justify the means, may be tempting.<sup>139</sup> By using a metric of just action and consistently sticking to it, a state can analyze grey problems when they

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<sup>137</sup>Tobias Thiel, "Yemen's Arab Spring: From Youth Revolution to Fragile Political Transition," The London School of Economics and Political Science, [http://www.lse.ac.uk/IDEAS/publications/reports/pdf/SR011/FINAL\\_LSE\\_IDEAS\\_\\_YemensArabSpring\\_Thiel.pdf](http://www.lse.ac.uk/IDEAS/publications/reports/pdf/SR011/FINAL_LSE_IDEAS__YemensArabSpring_Thiel.pdf) (accessed January 6, 2014).

<sup>138</sup>"The Universal Declaration of Human Rights," UN.org, <http://www.un.org/en/documents/udhr/#atop> (accessed January 12, 2014).

<sup>139</sup>Walzer, *Just and Unjust Wars*, 251.



arise and change courses of action as required, acting justly and understandably in the international arena. Especially in a world so closely tied together and in an arena as hotly debated as war, maintaining international support is critical and requires doing things that are right, but not necessarily easy. International agreements such as the Geneva Conventions take a step in the right direction, but do not provide all the answers. Just War Theory provides a way to frame problems, grey or not, to ensure planned actions meet an in-depth, ethical analysis to guide decision makers towards actions that retain the moral high-ground so important in international legitimacy.

Just War Theory is not a one-time exercise. Decision makers must re-examine the situation as it changes. In warfare, branch plans and follow on operations are normal. When they occur, they must meet the requirements laid out in Just War Theory; otherwise, it creates an inconsistent narrative, stripping credibility from the actor. Likewise, only by linking actions to a strategy that serves to reach an end-state can a campaign be successful. In Just War Theory, if no just end is planned, just action in a just cause will not succeed in anything other than stripping itself of justice. The United States fell into this trap in Pakistan and Yemen. Although the basis and the action may be just, unending conflict is not.

Even worse, the secrecy of these wars has stripped the United States of credibility, not just internationally but internally as well. Just War Theory works to ensure that the actions taken by a state are responsible toward the international community, an enemy, and the citizens of the state itself who must bear the cost of the government's policies. In a democracy, the government is elected by the people and responsible to the people. One could even say that our government derives its "just powers from the consent of the governed."<sup>140</sup> Short term CIA or Special

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<sup>140</sup>"The Declaration of Independence," UShistory.org, <http://www.ushistory.org/declaration/document/index.htm> (accessed December 30, 2013).

Operations covert action is one thing, but a prolonged war in two different countries on the other side of the world is another—and the two should not meet. All US citizens have the responsibility to “support and defend the constitution,” to “stay informed of the issues affecting your community,” and to “participate in the democratic process,” to hold government accountable for its actions.<sup>141</sup> Fighting a covert war circumvents the democratic process by preventing the people from having a say in one of the most critical actions a government can take. “A government, so modeled as to rest continually on the will of the whole society, is a practicable government.”<sup>142</sup> If the United States desires others to act justly and democratically, it needs to set the example by acting justly and openly itself.

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<sup>141</sup>“Citizenship Rights and Responsibilities,” U.S. Citizenship and Immigration Services, <http://www.uscis.gov/citizenship/learners/citizenship-rights-and-responsibilities> (accessed January 4, 2014).

<sup>142</sup>Thomas Jefferson “Self-government,” Thomas Jefferson on Politics & Government, <http://famguardian.org/Subjects/Politics/ThomasJefferson/jeff0600.htm> (accessed January 6, 2014).

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